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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ISABELLE CRAIG, sole heir-at-law and successor in interest to CARL M. WORTH, and SHELL OIL COMPANY, a Delaware corporation, *Appellants,*

v.

JOHN E. BICKEL, ETTA MAE BICKEL, GETTY OIL COMPANY, TOTAL LEONARD, INC., THE DOW CHEMICAL COMPANY, SAXON OIL COMPANY, JAMES I. FAIRCHILD, WINIFRED E. FAIRCHILD, and DELORES M. COOK d/b/a SOUTHWESTERN OIL COMPANY, *Appellees.*

On Appeal From The Supreme Court Of Michigan

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

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* A listing of the affiliates and subsidiaries of Shell Oil Company required by Rule 28.1 of the Rules of this Court appears in appellants' Jurisdictional Statement, p.i., n. **.

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I.

Earlier this Term, the Court noted probable jurisdiction in two appeals that raise, inter alia, the same issue as this appeal and that concern a nearly identical state dormant mineral act. *See Texaco, Inc.* v. *Short,* No. 80-965, and *Pond* v. *Walden,* No. 80-1018, *prob. juris. noted and consolidated,* 49 U.S.L.W. 3710 (March 23, 1981).

Appellees do not contend that the Indiana appeals are distinguishable in any way from this case. The statutes before the Court in the Indiana appeals and the one in this case provide for automatic extermination of fee ownership of subsurface mineral interests. Neither statute provides notice to the affected owner, or an opportunity to be heard, or compensation for the lost interests. Both statutes are the subjects of substantial challenges under the Due Process Clause of the Fourteenth Amendment. The decision to undertake plenary review of the Indiana judgment should lead to the same treatment of the Michigan judgment.

II.

A.

Appellees misconceive appellants' argument that the Dormant Mineral Act ("the Act"), Mich. Comp. Laws § 554.291 (1970), effects a taking of property without affording the safeguards required by the Fifth and Fourteenth Amendments.

The principal reason advanced by appellees in support of their argument that the Act does not effect a taking is their assertion that it does not impair substantive property rights, but is procedural, like a statute of limitations. The Michigan Supreme Court's binding construction of the Act negates this assertion: "[T]he act is designed to increase the marketability and development of severed mineral interests by creating a rule of substantive law which requires owners to undertake minimal acts indicative of ownership at least every 20 years." (Juris. Statement at 17a.)

Appellees also argue that affirmative duties may be imposed upon landowners without due process notice. Their reliance in this regard upon *American Land Co.* v. *Zeiss*, 219 U.S. 47 (1911), supports our position, not theirs. While it is true that landowners there were required by the California legislature to assert their claims to land and affirmatively prove their title after the San Francisco earthquake of 1906, the statute was not self-effectuating. Title to land was settled or lost orly by judicial decree in an *in rem* proceeding. And, most important here, notice by publication had been given in designated newspapers at least once a week for two months to the landowners prior to those proceedings. *Id.* at 49-54, n.1.

The law of adverse possession is similarly not helpful to appellees' position here. As recognized below, adverse possession in Michigan requires actual possession (Juris. Statement at 11a) which is notorious, open, and hostile. Such possession of land by another is deemed to constitute notice of an adverse claim to the land. *See, e.g., Welch* v. *Unknown Heirs*, 226 F.2d 776, 779 (D.C. Cir. 1955).[1]

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[1] As we have shown, the Act is also unlike marketable title acts or other title recordation legislation (Juris. Statement at 12.) Those statutes, unlike the Michigan Dormant Mineral Act, involve situations where more than one party has some legitimate claim, albeit perhaps conditional and remote, to the same property. Marketable title acts provide a means for assigning priority among such claims. Here, by contrast, the Michigan statute takes property from one person with clear title and gives it to another whose sole claim of title is based upon the statute itself. Moreover:

> "[A]s a practical matter, [marketable title acts] will probably cut off nothing at all, because there are no valid outstanding claims. It has been the experience of states with long-term marketable title acts that few if any notices of claim are ever filed, thus indicating that few claims actually exist." L. Simes, The Improvement of Conveyancing by Legislation 4 (1960).

Appellees also rely upon the tests identified by the Court in *Penn Central Transportation Co.* v. *City of New York,* 438 U.S. 104 (1978), to demonstrate that there is no taking of property under the Act. But the "economic impact" focused upon in *Penn Central, id.* at 124, "and, particularly the extent to which the regulation has interfered with distinct investment-backed expectations," *id.,* could hardly be more complete than in this case—a destruction of all title to property whose principal function is to provide income to its holder.

Moreover, *Penn Central 's* purported requirement of a "physical invasion" of property by government (Motion to Dismiss at 9) does nothing to advance appellees' case here. The Michigan statute deprives a mineral estate owner of his possessory interest and vests it in another. It is hard to imagine an invasion of a property right that is more severe. In any event, to the extent appellees claim that actual physical trespass is required to give rise to a taking, they ignore decisions of this Court that make it clear that, even in the absence of a physical invasion, the total deprivation of all ownership rights—for instance, title to intangibles—may constitute a taking. *See, e.g., Armstrong* v. *United States,* 364 U.S. 40 (1960).

B.

A fundamental error pervades appellees' discussion of the taking issue raised by this appeal. They focus only upon the registration requirement of the Act and fail to recognize or deal with the destruction of title to real property that the Act brings about as a result of the failure to register. (Motion to Dismiss at 9.)

The same error leads to appellees' reliance upon the *Goldblatt-Hadacheck-Schoene* line of cases[2] (Motion to Dismiss at 9-11). Appellees emphasize the significant reduction in value to the property in all three cases, pointedly referring to the Court's refusal to find that there had been a taking. All of these cases, however, were land use regulation cases, where the landowners argued that the challenged regulation was so severe that it rose to the level of a taking. This appeal, by contrast, is not a case of taking by regulation. Rather, the State of Michigan has adopted regulations that are enforced by a taking. When, as here, the statutory scheme results in a taking, nothing less than notice and an opportunity to be heard can satisfy the requirements of the Constitution.

C.

Appellees devote the last two pages of their Motion to Dismiss to an explanation of the public policies which they say are promoted by the Act. Appellants do not contend that the Act fails to serve a valid public purpose. It is important, however, to recall what that purpose is. In the words of the Michigan Supreme Court:

> "The primary purpose of the act is not to vest title to the severed [oil and gas] interests in the surface owner but rather is to facilitate development of those sub-surface properties by reducing the problems presented by fragmented and unknown ownership." (Juris. Statement at 10a.)

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[2] Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Miller v. Schoene, 276 U.S. 272 (1928).

While the Michigan statute's purpose is not being challenged, the legislature's choice of means to accomplish that purpose is. The issue here is whether the State can achieve its goal by taking private property by means of a self-effectuating statute that fails to provide affected owners with any notice of the taking or any opportunity to be heard in order to assert their ownership at a time when such an assertion may still have meaning.

The problem addressed by the Act is very similar to that which the States' escheat statutes address: how to return lost, abandoned, or forgotten property into the stream of commerce. Appellees, however, ignore the Constitutional underpinnings of the escheat statutes, and consequently depreciate the significance of this Court's decisions reviewing these acts.

Appellees' argument against the applicability of the escheat statutes to this case actually identifies the chief source of the Act's unconstitutionality. They recognize that escheat statutes do provide a proceeding to which finality attaches and require notice of that proceeding. Here, although the Act purports to operate with finality (title "shall vest . . . in the owner or owners of the surface"), it fails to provide for any proceeding where the property owner has a meaningful opportunity to object to the taking of his property or any notice of the operation of the Act upon individual interests. Michigan's avoidance of the fair notice requirements that lie at the heart of the Due Process Clause, *e.g., Armstrong* v. *Manzo,* 380 U.S. 545, 550 (1965), can hardly be justified by an argument that emphasizes Michigan's failure to provide any proceeding to which such notice might attach.

Similarly, appellants' reliance on the escheat cases cannot be avoided by the argument (Motion to Dismiss at 4-5, 14-15) that a State may impose restrictions upon the ownership, use, and disposition of property,[3] or that a person is presumed to have notice of all such laws. This Court has so stated in its review of Kentucky's escheat statute. *Anderson National Bank* v. *Luckett*, 321 U.S. 233, 243 (1944). But more than mere constructive notice of the statutory definition of abandoned bank accounts and other intangibles is required before the property rights of depositors can be cut off:

> "[I]f the statute is deficient in its provisions for notice and opportunity for hearing so that the depositors would not be bound by any proceedings taken under it, the bank would be entitled to raise the question whether its obligation to the depositors would be discharged by payment of the deposits to the state. *Hence our inquiry must be directed to the question whether the procedure by which the state undertakes the depositors' right to demand payment of the deposits was upon adequate notice to them and opportunity for them to be heard.*" *Anderson National Bank* v. *Luckett, supra*, 321 U.S. at 243 (emphasis added).

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[3] This Court is not being asked to consider the quite different issues presented by a statute that applies only prospectively and that merely conditions the type of mineral interests which may thereafter be created. Legislation that is prospective only was thought by the author of the Act to be a "basic requirement[] for such a statute to make it constitutional," Street, *Need for Legislation to Eliminate Dormant Royalty Interests*, 42 Mich. State B.J. 49, 52 (1963), but the Act has been given retroactive effect as well.

The purpose of such notice is to inform a depositor of the State's plan to claim the account and to give him or her the opportunity to appear before an administrative or judicial officer and assert ownership of the funds—in effect, to state that the account has not been abandoned.

Appellants claim a similar right to be informed here *before* their property is taken. As the Court held in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), the notice required by the Due Process Clause is a meaningful notice given at a time when the recipient of the notice can still take action to preserve its property.

Thus, appellees miss the point when they state that sufficient post-deprivation opportunities exist for affected owners of oil and gas interests to assert that they have performed one or more of the activities listed in the Act (Motion to Dismiss at 15-17). The hearing referred to by appellees is meaningless when considered from the perspective of the property owner's need to be informed that his or her property is in jeopardy at a time when action can be taken to save it. Only notice prior to the taking will afford a meaningful opportunity to claim the property before the statute operates to take it.[4]

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[4] Appellees' related assertion that appellants lack standing (Motion to Dismiss at 11-13) is wrong for the same reason. Appellants are not arguing for a hearing on issues that concededly do not apply to them. We are claiming a Constitutional right to be heard on an issue that is totally ignored in the Dormant Mineral Act.

Appellees concede that if the Act results in "a substantive deprivation" of property rights, notice and an opportunity to be heard would be required by the Due Process Clause (Motion to Dismiss at 15-19). However, appellees would limit such "due process" to a post-taking hearing at which it would be too late for the property owners to assert his or her interest in the property. Appellants, on the other hand, seek a meaningful hearing, before the taking is accomplished, that gives owners of sub-surface minerals timely opportunity to challenge the taking.

In this regard, appellants seek to protect a basic interest that was recognized in the Court's decision in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). That case recognized an individual's right to notice of a proceeding to settle accounts, not for the purpose of litigating factual issues, but simply to state that he or she did not want to be represented by the trustee in that proceeding.[5] Similarly, in this case, appellants claim the right to be notified and appear to assert their rights prior to the time when the statute condemns them.

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[5] *See also* Fed. R. Civ. P. 23(c)(2), which recognizes the constitutional right of a party to be notified that its interests may be decided in a proceeding and to appear solely for the purpose of "opting out." *See* Hansberry v. Lee, 311 U.S. 32 (1940).

CONCLUSION

For the reasons recited above, this Court should deny appellees' Motion to Dismiss or in the Alternative to Affirm, grant the pending appeal, and hear this case on the merits.

Respectfully submitted,

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